

1 STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE  
2 ALAMANCE COUNTY SUPERIOR COURT DIVISION  
3 File No. 16 CVS 990

4 -----  
5 CRAZIE OVERSTOCK PROMOTIONS, LLC

6 Plaintiff,  
7 vs.

8 STATE OF NORTH CAROLINA, MARK J.  
9 SENTER, in his official capacity  
10 as Branch Head of the Alcohol  
11 Law Enforcement Division, and in  
12 his individual capacity; et al,

13 Defendants.  
14 -----

15 CONTINUED HEARING ON PRELIMINARY INJUNCTION  
16 BEFORE THE HONORABLE JUDGE WINSTON M. ROZEIR, JR.

17 Thursday, November 2, 2017

18 Wake County Courthouse

19 311 Fayetteville Street

20 Raleigh, North Carolina

21 Time Commencing 9:30 a.m.  
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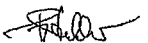
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<p>1 APPEARANCES OF COUNSEL</p> <p>2</p> <p>3</p> <p>4 ON BEHALF OF THE PLAINTIFFS</p> <p>5 MORNINGSTAR LAW GROUP</p> <p>6 BY: KEITH B. ANTHONY, ESQUIRE</p> <p>7 WILLIAM J. BRIAN, JR. ESQUIRE</p> <p>8 421 Fayetteville Street</p> <p>9 Suite 530</p> <p>10 Raleigh, NC 27601</p> <p>11 (919) 590-0370</p> <p>12 kanthony@morningstarlawgroup.com</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19 ON BEHALF OF DEFENDANTS</p> <p>20 NORTH CAROLINA DEPARTMENT OF JUSTICE</p> <p>21 BY: J. JOY STRICKLAND, ESQUIRE</p> <p>22 114 West Edenton Street</p> <p>23 Raleigh, North Carolina 27603</p> <p>24 Phone: 919.716.6516</p> <p>25 JStrickland@NCDOJ.gov</p> <p>***</p>	<p>1 INDEX OF EXAMINATIONS AND EXHIBITS</p> <p>2 WITNESS JEFF SMITH Page</p> <p>3 Examination by Mr. Anthony 12</p> <p>4 Examination by Ms. Strickland 18</p> <p>5 WITNESS PETER GORDON, PH.D.</p> <p>6 Examination by Mr. Brian 27, 89</p> <p>7 Examination by Ms. Strickland 75</p> <p>8 WITNESS KEITH BUSH</p> <p>9 Examination by Mr. Anthony 94, 119</p> <p>10 Examination by Ms. Strickland 103, 123</p> <p>11 WITNESS TED LYDA</p> <p>12 Examination by Mr. Anthony 123, 153</p> <p>13 Examination by Ms. Strickland 140</p> <p>14</p> <p>15 PLAINTIFF'S EXHIBITS FOR ID IN EVIDENCE</p> <p>16 25 -- 40</p> <p>17 26 -- 42</p> <p>18 52 101 122</p> <p>19 53 136 139</p> <p>20 54 -- 161</p> <p>21</p> <p>22 ***</p> <p>23</p> <p>24</p> <p>25</p>
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<p>1 PROCEEDINGS</p> <p>2 (Whereupon, the Court had a discussion with the</p> <p>3 litigant and the official on staff court reporter</p> <p>4 was dismissed.)</p> <p>5 THE COURT: Yes, sir, so what were you</p> <p>6 saying in regard to the affidavits of</p> <p>7 witnesses that you wanted to address?</p> <p>8 MR. ANTHONY: Thank you, your Honor, and</p> <p>9 also as a preview. We have today Jeff Smith</p> <p>10 who is finishing up his testimony on the</p> <p>11 redirect and any further re-cross examination</p> <p>12 and we are calling Dr. Gordon as an expert</p> <p>13 witness to testify as well.</p> <p>14 In addition to that you might recall</p> <p>15 that we talked about the possibility of</p> <p>16 presenting some affidavits from some owners</p> <p>17 of retail establishments to explain that the</p> <p>18 reason that they had closed their stores is</p> <p>19 as a result of some of the law enforcement</p> <p>20 actions by ALE.</p> <p>21 We had previewed what those affidavits</p> <p>22 might look like with the Court and with Ms.</p> <p>23 Strickland. We prepared those affidavits and</p> <p>24 presented those to Ms. Strickland for her to</p> <p>25 review and see if she would consent to the</p>	<p>1 use of those in lieu of having live</p> <p>2 testimony.</p> <p>3 She has reviewed those and has indicated</p> <p>4 to us that she will not consent to the use of</p> <p>5 those affidavits.</p> <p>6 We have three of them, three affidavits,</p> <p>7 and they are consistent with what I think we</p> <p>8 had previewed to the Court and to Ms.</p> <p>9 Strickland.</p> <p>10 Two of those witnesses, the affidavits</p> <p>11 are from Ted Lyda, Keith Bush, and Dawn</p> <p>12 Moffatt. Two of those witnesses, Ted Lyda</p> <p>13 and Keith Bush are available here this</p> <p>14 morning to testify and they will be getting</p> <p>15 here by 11:00 a.m.</p> <p>16 We can have them testify. Dawn Moffatt</p> <p>17 is not available today or tomorrow to be able</p> <p>18 to testify.</p> <p>19 I think for purposes of the hearing, we</p> <p>20 will likely be able to just expedite it and</p> <p>21 go on the affidavits. I don't know that live</p> <p>22 testimony is necessarily required.</p> <p>23 This is a preliminary injunction hearing</p> <p>24 as opposed to a full-blown trial.</p> <p>25 For purposes of Mr. Lyda and Mr. Bush</p>

<p style="text-align: right;">Page 222</p> <p>1 based solely on chance.</p> <p>2 When you take the whole system into</p> <p>3 play, I would argue that the amount of chance</p> <p>4 that is present predominates that as skill</p> <p>5 and doesn't put them into any exception in</p> <p>6 this statute, your Honor, or the others that</p> <p>7 are there.</p> <p>8 Your Honor, a case came out just in</p> <p>9 August of this year where Crazie Overstock</p> <p>10 had sued the Bladen County Sheriff's Office</p> <p>11 and realizes an unpublished opinion. I am</p> <p>12 not asking your Honor to consider it for</p> <p>13 precedential value.</p> <p>14 Specifically in that case the Court of</p> <p>15 Appeals said that they were not determining</p> <p>16 the merit of the Rewards system. They were</p> <p>17 addressing specifically whether or not there</p> <p>18 was an immunity issue for the defendants in</p> <p>19 that case.</p> <p>20 But in their opinion, it says, "It</p> <p>21 certainly can be argued that the CO rewards</p> <p>22 program is a form of illegal gambling," and</p> <p>23 it goes on to explain exactly what the Crazie</p> <p>24 Overstock program does.</p> <p>25 I am not asking your Honor to consider</p>	<p style="text-align: right;">Page 223</p> <p>1 that for the purpose of setting a</p> <p>2 precedential appellate case that has rules</p> <p>3 already on the legality of this program, but</p> <p>4 if the Court of Appeals has included language</p> <p>5 saying, "It can be argued," then I am</p> <p>6 asking your Honor to look at the evidence</p> <p>7 that you have heard which is, as I say, I am</p> <p>8 making the argument that it is illegal</p> <p>9 gambling, for you to find that the plaintiffs</p> <p>10 cannot show they can be successful on the</p> <p>11 merits because the way that their system</p> <p>12 operates does violate the law, your Honor.</p> <p>13 Thank you.</p> <p>14 THE COURT: Yes, sir.</p> <p>15 MR. ANTHONY: Thank you, your Honor.</p> <p>16 Let me address that case first to be very</p> <p>17 clear about that. It is a recent case to the</p> <p>18 Court of Appeals and it involved Crazie</p> <p>19 Overstock and the Court made a statement that</p> <p>20 it could be argued in-dicta at the end, but</p> <p>21 the issue in that case was whether or not</p> <p>22 there was quasi-judicial immunity or</p> <p>23 qualified immunity.</p> <p>24 The merits of that case, the merits of</p> <p>25 the Rewards Program, the details of how the</p>
<p style="text-align: right;">Page 224</p> <p>1 Rewards Program operates was not presented to</p> <p>2 the Court of Appeals.</p> <p>3 That was not an issue at all that was</p> <p>4 discussed with the Court of Appeals.</p> <p>5 There was clearly no determination, no</p> <p>6 nothing, related to that. They threw that</p> <p>7 statement in there. There actually has been</p> <p>8 a rehearing that has been granted in that</p> <p>9 case. The defendant requested so it is</p> <p>10 actually going to continue back before the</p> <p>11 Court of Appeals as it is.</p> <p>12 This argument with respect to it is a</p> <p>13 sweepstakes because there a prize that is</p> <p>14 really an argument that is based on</p> <p>15 semantics, as best as I can understand it.</p> <p>16 It is based on Exhibit 13 having the</p> <p>17 word prizes listed at the top.</p> <p>18 There was direct testimony about that</p> <p>19 term by Mr. Smith and by Mr. Farley. The</p> <p>20 word "prizes" was not a legal term as is</p> <p>21 being used now by Ms. Strickland in her</p> <p>22 argument. It was just, "Those are the</p> <p>23 Reward points that you get."</p> <p>24 It says prizes, however as we were clear</p> <p>25 that legally what a prize is, it is something</p>	<p style="text-align: right;">Page 225</p> <p>1 that has value and here all the evidence</p> <p>2 shows is that these Reward points have no</p> <p>3 value. As I discussed earlier there is</p> <p>4 nothing you can do with that.</p> <p>5 You cannot redeem them for cash. You</p> <p>6 cannot go get products off the website or</p> <p>7 discounts off those products. You cannot</p> <p>8 apply it towards shipping or discount on the</p> <p>9 shipping. You cannot use it for anything</p> <p>10 other than going back and playing Rewards</p> <p>11 Games again or using it to enter the</p> <p>12 dexterity test.</p> <p>13 As I mentioned before, as we cited in</p> <p>14 our brief, there are cases that say that just</p> <p>15 being able to play something again, to play</p> <p>16 something like that, is not something that is</p> <p>17 of value.</p> <p>18 The Rewards points have no value and</p> <p>19 that is not a basis to say under the law that</p> <p>20 it is a sweepstakes. When you look at the</p> <p>21 way that that statute operates and the way</p> <p>22 that our system does, it doesn't.</p> <p>23 It is always important to keep in mind</p> <p>24 too, as you think about, just because there</p> <p>25 is some sort of chance associated with it, it</p>

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1 doesn't make it a sweepstakes.  
 2 A sweepstakes by definition means a game  
 3 of chance according to 14-306.4 subsection A  
 4 5, "sweepstakes means any game advertising  
 5 scheme or plan or other promotion which with  
 6 or without payment of any consideration a  
 7 person may enter to win or become eligible to  
 8 receive a prize a determination of which is  
 9 based upon chance."  
 10 Under the sweepstakes statute,  
 11 sweepstakes is a game of chance, but there is  
 12 a carve out if it is dependent upon skill or  
 13 dexterity.  
 14 By definition, a sweepstakes is a game  
 15 of chance, however, if it has skill and  
 16 dexterity to it, then it is not an illegal  
 17 sweepstakes under 14-306.4.  
 18 The Court of Appeals in the Gift Surplus  
 19 Sand Hills case has clarified that. When you  
 20 look at this what you are figuring out is  
 21 whether the ultimate outcome, the actual  
 22 prize which in here is the cash back Reward,  
 23 whether that is determined by chance, whether  
 24 chance can override or thwart the exercise  
 25 of skill.

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 2 United States of America )  
 3 ss:  
 4 ORANGE COUNTY )  
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 6 CERTIFICATE OF THE REPORTER  
 7  
 8 I, T. S. Hubbard, Jr., a do hereby certify  
 9 that the witness whose deposition is hereinbefore set  
 10 forth was duly sworn by myself, a duly authorized notary  
 11 in and for the State of North Carolina, and that the  
 12 within transcript is a true and accurate reflection  
 13 of the testimony herein.  
 14 I further certify that I am not related by  
 15 blood or marriage to any of the parties who are at  
 16 issue in this cause of action.  
 17 IN WITNESS WHEREOF, I have hereunto set my  
 18 hand this 6TH day of November 2017.  
 19   
 20 \_\_\_\_\_  
 21 Thomas S. Hubbard, Jr.  
 22 Court Reporter  
 23  
 24  
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1 And here as we have shown the only prize  
 2 that you get is not thwarted by chance. It  
 3 is not overridden by chance in any scenario.  
 4 It is always determined by the skill and the  
 5 dexterity so it is not an illegal sweepstakes  
 6 under 14-306.4.  
 7 THE COURT: We are going to recess at  
 8 this time. Come back tomorrow morning at  
 9 10:30 and I say that because I may need some  
 10 extra time to make sure that I am clear in  
 11 regards to my ruling on the State's motion to  
 12 not proceed.  
 13 But everyone needs to be prepared in the  
 14 event that I deny the motion. We are in  
 15 recess until 10:30.  
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